MERGERS OF VODAFONE-IDEA AND JET-ETIHAD: A BOON OR BANE TO COMPETITION

Naimisa Madduri, NALSAR University in collaboration with IICA

1.1 Introduction

Post covid era came as a financially volatile period for not only the public in general but also the big corporate players in the markets. The year 2022 witnessed several high-profile mergers including the takeover of twitter by Elon Musk, merger between Air India and Vistara, merger between PVR cinemas and INOX and the very favourite merger between Zomato and Blinkit. While a lot of these mergers involved each of the parties having either market share contrary to the other, the impact on the market was negligible. Whereas, some other mergers where the parties engaged in similar trading of goods and holding majority of the shares in the market, announced such transactions, the apprehension of these mergers creating an adverse effect on the competition arises.

The Act introduced a merger control system which entered into force in 2011. In a short span of more than a decade, CCI has evolved into a robust market regulator that strives to continuously work with various investors and the international antimonopoly committees to develop a robust merger evaluation framework. The commission has cautiously made an inquiry into a number of transactions and successfully restricted the anti-competitive ones. It is a very huge responsibility that the commission carries as the impact of an anti-competitive merger can be extremely detrimental. The commission is also expected to shield the benefits certain mergers offer to the public that might ultimately lead to the increase in the standards of the society. "CCI will have to bear in mind the requirements of a diverse economy such as ours and strive to strike a balance between enforcement and advocacy, dovetailing the two functions", as stated by the Chairperson of the Competition Commission of India on 7th June, 2022 in a conference conducted by the Ministry of Corporate Affairs.

The merger of Vodafone-Idea carried on its face, the immediate necessity to defend the competition by Reliance Jio in the Telecom industry. The merger instilled confidence in the Telecom market when there was a hike in the prices due to the dominance Reliance-Jio established. Although the merged company took over the market, the transaction was supported by the pros it brought to the customers. Coming to the Jet-Etihad airways merger, it was the first time the commission's decision was challenged before the COPMAT. It is also one of the few cases where the Commission has provided a detailed analysis of both the relevant merged market and the Commission's competitive assessment. The researcher has in detail, explained the facts, reasons and impact of the mergers and the commission's decision, in the latter parts of the paper with the help of statistics and case laws.

1.2 Review of Literature

The researcher with her preliminary research opted for doctrinal research as the feasible method and has revied a number of articles, books and judgements in lieu of the same. The researcher selected two case studies which discuss certain topics related to competition. To have a basic understanding of the terms- competition, relevant market, control, combinations etc., the researcher referred to the ***Competition law***[1] book which provides a detailed explanation of the provisions of the Act.

To add efficiency to the study, the researcher referred to certain articles written by eminent jurists and professionals. The article – "***Merger Under The Regime of Competition Law: A Comparative Study of Indian Legal Framework with EC and UK"***[2], makes a comparative analysis of the laws governing competition in both the countries with the laws in India with the intent- jurisdictions have somewhat similar legislative approach and scheme of enforcement. Another paper which makes a comparative study of the competition laws in India is "***The Anticompetitive Effect of Mergers on Competition on Tanzania and India"***[3] which also discusses whether or not mergers can be used as a tool to manipulate the market and eventually regulate the market cycle. Although the study doesn't discuss about the competition laws abroad, the review of these articles helped in understanding Indian laws better.

To identify the facts and judgements given in the case study- Vodafone-Idea merger, the articles – "***Merger of Vodafone and Idea"***[4], which discusses the conditions, reasons behind the merger and impact of the merger, "***Merger and Acquisition deal between Vodafone and***

[1] T. RAMAPPA, *COMPETITION LAW IN INDIA (Oxford 2006).*
[2] Neeraj Tiwari, *Merger under the Regime of Competition Law: Comparative Study of Indian Legal Framework with EC and UK*, 23, BOND L. REV., 117 (2011).
[3] Sayed Qudrat Hashimy, *The Anticompetitive Effect Of Mergers On Competition In Tanzania And India*, 7, DRJ, 28(2022).
[4] Dhananjay Mani Tripathi, *Merger Of Vodafone And Idea*, 9, IJMR, 256 (2023).

Idea"[5], which discusses the same with the help of statistics and market analysis of the companies post-merger and "***A Post-Merger Analysis of Vodafone-Idea Ltd."***[6], which analyses the telecom industry post-merger, were revied.

To support study on the case study- Jet-Etihad Airways, the researcher referred to "***Jet-Etihad Deal and its Competitive Concerns"***[7], which discusses the merger deal and the reasons for approval by Competition Commission of India and "***Lessons to be learned from India's latest high profile merger review: the Jet-Etihad deal"***[8], which discusses the reasons the commission's decision was appealed.

2.1 A legal approach towards Mergers

2.1.1 Prefatory

Mergers are a common activity that occur in the economic market every other day. They are treated as a means of expansion of businesses due to their numerous advantages. Mergers generally take place between companies in the same industry, engaged in the same or similar kind of business or in the same level of manufacturing or distribution chain. In a merger, one can witness the exchange or distribution of control over the assets, shares or management of one company or both the companies, between the companies getting merged. Companies Act explains mergers under Section 230- Explanation – (i)[9]. When broadly interpreted, it provides the conditions mentioned for a scheme to be considered a merger or a demerger. As stated down simply, when two companies conduct a transfer of a part or whole of the assets or liabilities of one to another resulting in one new or existing company and subsequently winding up of one or both the companies is recognised as a merger.

2.1.2 Mergers under Competition law

However, under the competition law, there is no such explicit definition or explanation of mergers but a number of procedures and regulations have been laid down to curb and control

[5] Nitesh Kumar, *Merger And Acquisition Deal Between Vodafone And Idea*, ALLIANCE UNIVERSITY (2021).
[6] Dr. Ashok Kumar Panigrahi, *A Post-Merger Analysis of Vodafone-Idea Ltd.*, KALINGA UNIVERSITY (2019).
[7] Akansha Mehta, *Jet-Etihad Deal and its Competitive Concerns, IPLEADERS* (6th September, 2023, 14.00 pm), https://blog.ipleaders.in/jet-etihad-deal-and-its-competitive-concerns/
[8] Avirup Bose, *Lessons to be learned from India's latest high profile merger review: the Jet-Etihad deal,* SSRN (2014).
[9] Companies Act, 2013, § 230, No. 18, Act of Parliament, 2013 (India).

the negative impact of such mergers on the competition in the market. Section 5[10] of the Act provides for instances in which a combination is said to have resulted in. The term combination has a wider scope and includes transactions in addition to mergers.[11] The section also provides for threshold limits with reference to financial value of assets or turnover of the companies involved in the combination. In addition to these, the section acknowledges a combination to be a merger or an acquisition if it falls under the following:

- When a party gains a good influence over the voting rights or control over the assets
- When a party buys the other, takes control of shares or voting rights
- When a party gains direct or indirect control over another and all such enterprises conducting business of distribution, manufacturing or trading of a service or goods of a similar kind.
- When a party subsequent to a merger takes control of a group and its valuation results in an amount greater than Rs. 4000 Crores or assets valued at greater than 2 billion USD.

Mergers are often seen as a means to expand business while competition law at times, sees them to be creating hindrance to the growth of competition in the market. Mergers are apprehended to cause the following cons to the market:

- Reduction of competition in the market
- Restriction of entry to new businesses into the market
- Limitation of output into the market
- Curtailment of innovation and development
- Increase in the price of goods and services, thereby influencing the interest of the consumers

[10] The Competition Act, 2002, § 5, No. 12, Act of Parliament, 2003 (India).
[11] supra note 1.

2.1.3 Court's approach

Till date, the Judiciary has played a supervisory role while adjudicating on the merger petitions placed before them. The Companies Act perse doesn't indulge into the commercial merits of the scheme and so, the courts resist in getting involved when any such attempts are made by the litigants. However, the court requires a report to be made and presented on the books of accounts and documents of the companies by the official liquidator in cases where the mergers or amalgamations result in winding up of either or both the companies. In cases where unfairness is pleaded and proved by one of the parties, the court is bound to step in and order for investigation. For the same, the provisions of the Act are also referred as the Companies act doesn't necessarily provide for the mergers falling under the Act for their approval under the companies act. It is in the recent times that the courts have brought the concept of 'pubic interest' under the purview of Section 230[12] of the companies act, thereby extending the scope and compelling the parties to go through the procedures under the competition law. The question of 'public interest' was first raised in the case of ***Hindustan Lever Employees' Union vs Hindustan Lever Limited.***[13]

2.2 Merger Control Regime in India

The Act is the principal legislation that governs combinations i.e., mergers and acquisitions in the country. In the year 2011, Section 5[14] and section 6[15] of the Acts have been enacted to exercise control over the negative impact of mergers on the market. Although the merger regime is also governed by the policies of the "Ministry of corporate affairs, Government of India (MCA) and the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (as last amended on 9 October 2018)", the Act has an upper hand.[16] Section 6(1)[17] of the Act states that "*No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void*." Section

[12] Supra note 9.
[13] Hindustan Lever Employees' Union vs Hindustan Lever Limited., Special Leave Petition (civil) 11006 of 1994
[14] supra note 10.
[15] The Competition Act, 2002, § 6, No. 12, Act of Parliament, 2003 (India).
[16] Rahul Rai, Nikita Agarwal, *Merger control in India: overview*, AZB PARTNERS (Sep. 6, 2023, 19.51 PM) https://www.azbpartners.com/bank/merger-control-in-india-overview/
[17] The Competition Act, 2002, § 6, cl. 1, No. 12, Act of Parliament, 2003, (India).

20[18] of the Act discusses about the inquiry into the combinations.

All forms of businesses shall verify and confirm the above to CCI before the transaction is completed. For the commission to determine whether a combination causes an adverse effect or not, it has to ascertain two things; one, the kind of combination the companies have entered into and two, the market structure of relevant market. The commission should be convinced that the combination would cause adverse effect on the competition. For the Competition Commission to take an action, it was required to be convinced of the adverse effect by a number of regulators in the case of ***Walmart and Flipkart v Competition Commission of India***.[19] The commission undertakes to restrict such practices by interpreting and bringing the actions of the parties under the purview of the provisions related to control, group, notifications and thresholds. The Competition (Amendment) Act, 2023[20] includes merger control regime.

3.1 Vodafone-Idea Merger[21]

3.1.1 Companies' profiles and Timeline of events of Merger

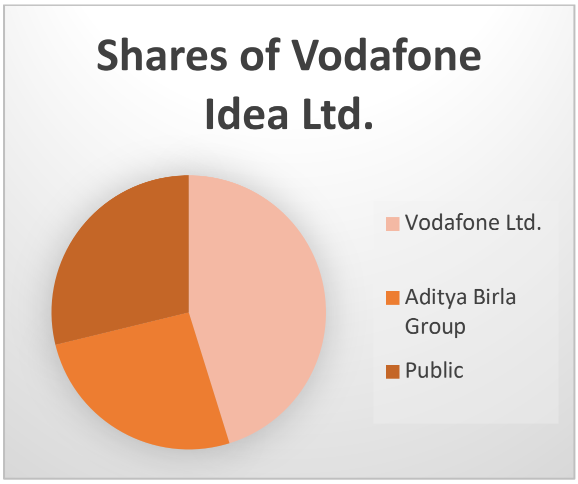
Vodafone India was a mobile network operator that offered cellular telephone services in India. It offered services like prepaid and postpaid number portability, roaming, mobile internet, consumer phones, audio and video facilities etc. The company supplied downloadable services in the sector of entertainment, lifestyle, gaming, social networking, amil and messaging, health, news, travel, finance and many more. It operated both physical and virtual and involved in both manufacturing and distribution of goods and rendering of services. In the year 2011, Vodafone Essar Limited changed its name to Vodafone India Limited.

Idea Cellular, established in 1995, was a Mumbai-based subsidiary of the Aditya Birla Group. operated across the country and involved in the services related to 2G and 3G GSM.[22] Idea was at a point India's 3rd largest mobile operator with a revenue market share of approx. 15%. It provided world class service delivery with its network extending to 4500 locations unique locations and over 7000 call centres all of which were enriched with up-to-date equipment and technology. The company provided high speed mobile broadband devices including

[18] The Competition Act, 2002, § 20, No. 12, Act of Parliament, 2003 (India).
[19] Walmart and Flipkart v Competition Commission of India, Combination Registration No. C-2018/05/571.
[20] The Competition Act, 2002, No. 12, Act of Parliament, 2003 (India).
[21] Vodafone India Ltd. v Competition Commission of India, Civil Appeal No(s). 11847-11851 of 2018.
[22] supra note 5.

smartphones and other accessories. The company received numerous awards and recognition for services such as TV, games, data at the most competitive prices.

The merger between the companies was announced by the Board of Directors of both the companies collectively on 20th of March, 2017. They received the approval of the Department for telecommunications in July 2018. The final approval for the merger to come into effect was given by the "National Company Law Tribunal" on 30th August, 2018. The merger ended on 31st August, 2018 and the subsequently formed entity was named "Vodafone Idea limited". The shares of the new company were held by both the companies and the public.



3.1.2 Motives behind the Merger

Reliance Jio has entered the market in the year 2016 with a list of free services including unlimited calling and data services. It continued to provide these services at a low cost even in the year of 2017. It is because of these comparatively low prices that Reliance captured the market and moved ahead of its competitors. Reliance held approx. 9% of the market share during the years 2016 and 2017. The advent of Reliance into the market came as a surprise and the competitors could do nothing but helplessly see its roots spreading across the telecommunication sector. There was no better option than mergers to stand the competition Jio gave. The dominance of Jio triggered brutal price wars among the competitors leading to oligopoly market structure.[23] A merger can be the only way to instil confidence in the companies by clubbing the synergy benefits, assets, networking and outreach of both the companies. It was assumed after thorough analysis of the market share and customer reach in

[23] supra note 4.

the telecom sector that the merged company would make significant impact in the market, surpassing Bharat Airtel and becoming the pan-India service provider.

Other major reasons for the companies to opt for merger is that the companies were in huge debt due to the reduction in the market share and the shift of customer loyalty towards Reliance Jio. Also, the companies individually faced problem with expensive restructuring of debts with their respective partners. The merging of the finances led to the reduction in the burden towards the change in the market trends. It also helps investing in data infrastructure, expansion of network and catering to the changing needs of the customers. While the other telecom players like Airtel and Jio are implementing distributive pricing strategy and offering incentives and plans to the customers through 5G technology and many more, it would help the companies in standing firm in the market.

3.1.3 Post-merger Impact

The merger of Vodafone and Idea paved a way for further mergers in the telecom industry. "The assets of Telenor India and Reliance Communication were bought by Bharti Airtel. Tata Teleservices customers have started migrating to the Airtel network under an Intra Circle Roaming (ICR) arrangement."[24] The merger initially succeeded in overcoming the debts of the companies respectively. The quality of service and development and innovation was a result of the merger. Cost synergies was created for both the companies which helped in reducing the operation cost, expanding network infrastructure, savings in energy costs etc. The merged entity having enough resources, aided in resource consolidation which ultimately largely benefitted the customer. The agreement between the companies prevented them from selling their operations which resulted in amelioration of services in the merged company. Fewer members in the market led to the stability of prices but, at the same time, analysts predicted an increase in prices. The mergers also affected employment in the country as the duplication of resources required job cuts too. The excuse of cost cutting was given for laying off a huge number of employees.

Vodafone-Idea captured 40%of the revenue market share and 35% of the customer market share, acquiring the top position in the telecom market.[25] The merged company became the

---

[24] supra note 6.
[25] Shruti Gupta, *Vodafone And Idea Merger*, LEGALSERVICEINDIA (Sep. 6, 2023, 20.06 PM) https://www.legalserviceindia.com/legal/article-12972-vodafone-and-idea-merger.html

largest telephone provider in some states and the second largest after Bharti Airtel in some other. With respect to the competition in the market and customer welfare, the merger was apprehended to have had a detrimental effect on the users of the services in the telecom industry. Decrease in the number of players in the market meant less competition amongst them. The prices of services would be decided by the 4 big players in the market. However, the fall in the stock price of the company at a later stage indicated the supremacy of the competitors Jio and Airtel. Some serious implications of the merger on the industry, both positive and negative, were identified as serious misbalance in the prices in the market, improving poor health of the industry through further mergers, credit flow into the market as the debts being cleared and better services to the customers.

3.2 Jet-Etihad Merger[26]

3.2.1 Companies' profiles and transaction

Jet Airways (India) Ltd is an Indian airline based in Delhi NCR with training and development centre in Mumbai. The airline was incorporated as a joint stock company in April 1992 and began operations as an air carrier company in 1993, started full operations in 1995 and added flights internationally in 2004. The airline was listed on the stock exchange in 2005 and 2007. It was the first and only private airline in India prior to Vistara's establishment in 2015. The airline is expected to continue flying by the end of 2023, becoming the first Indian airline to be relaunched.

Etihad Airways is the national airline of the United Arab Emirates and one of the two largest airlines in the country (the other being Emirates). Its headquarters are located in Khalifa City, Abu Dhabi, near Abu Dhabi International Airport. Etihad began operations in November 2003. It is the second largest airline in the United Arab Emirates after Emirates. The name Etihad in Arabic means unity.

In the year 2013, the first ever investment by a foreign airline in an Indian carrier was approved by the Competition Commission of India. The investment was made through the merger of the above-mentioned airlines where $339 million was proposed acquisition of 24% equity stake in Jet airways by Etihad Airways.[27] The merger deal consisted of 2 components. Firstly, a 24%

[26] Jet-Etihad v Competition Commission of India, Combination Registration No. C-2013/05/122.
[27] supra note 8.

equity of Jet airways held by Etihad airways and secondly, commercial co-operation agreement with respect to joint pricing, marketing, distribution, sales, cargo, technical handling etc. The merger resulted in the meeting of the threshold limits specified under the Section 5[28] of the Act. Also, the companies involved in the merger being in the same industry or engaging in the activities related to similar kind of products or services, Section 3(3)[29] of the Act is also attracted where the anti-competitive agreements are provided for.

3.2.2 Commission' decision

The Jet-Etihad decision is one of the few cases where the Commission has provided a detailed analysis of both the relevant merged market and the Commission's competitive assessment.

Relevant market

To define the relevant market, the Commission adopted the internationally accepted practice of defining the relevant market for scheduled passenger air traffic based on the origin/destination (OandD) city-pair approach, where each the combination of origin and destination is considered a separate market. The Commission has expanded the relevant markets from nine (9) non-stop markets between India and Abu Dhabi' to include non-direct (one-stop) flights from competing airlines on those routes. However, there is a minority opinion that plane tickets to Abu Dhabi and between Dubai and Mumbai/Delhi, customers consider such flights interchangeable.

Commission's assessment

In the recent case of ***Uber India Systems Pvt Ltd vs Competition Commission Of India***[30], although the commission assessed some anti-trust implications, it approved the deal to be profitable with no major concerns. Similarly, in the current case, the commission established that the transaction made no effect to the competitive setting or that there are other competing airlines that could limit the collective market dominance of Jet and Etihad on such routes. On routes such as Abu Dhabi-Delhi and Abu Dhabi-Mumbai, where Jet and Etihad would have a combined market share of at least 50%, the Commission found that the presence of Air India and other competing carriers provided sufficient alternative options so that consumers can

---

[28] supra note 10.
[29] The Competition Act, 2002, § 3, cl. 3, No. 12, Act of Parliament, 2003 (India).
[30] Uber India Systems Pvt Ltd vs Competition Commission Of India, CIVIL APPEAL NO. 641 OF 2017

choose. The commission found that the projected market share of Jet and Etihad (assuming Jet increases) is 22 percent and is insufficient to exploit market power.

In assessing the merger, the committee also noted that the potential impact associated with the proposed acquisition would result in a smaller transaction. The agreement allows Jet and Etihad to expand their networks and increase traffic density in each pair of cities, allowing them to maximize savings by using larger and more powerful aircraft. Merger also means better "customer service, ticketing, seat selection, airport lounges, mail distribution at the boarding gate" and so on.

Minority opinion is that, the market strength of Jet-Etihad's combined operations is questionable on the Mumbai-Abu Dhabi and Delhi-Abu Dhabi routes, where the combined market share of the post-merger input will are 55% and 50%. According to the minority, the suspension of Jet's flights to and from Dubai and Sharjah in the future will reduce the competitive pressure Jet is currently putting on other airlines operating on these routes, which might ultimately result in higher fares for flights on these routes. The minority opinion also takes into account that the combined market share of Jet and Etihad currently stands at 42% and that, after the merger, could become the largest carrier on the route.

3.2.3 Appeal against the commission's decision

The appeal against the decision of Jet-Etihad was appealed to COMPAT by Mr. Jitendra Bhargava, Director Emeritus of Air India. Mr. under Section 53B[31] of The Act. the COMPAT reminded of this right to appeal again in the recent case of ***Competition Commission of India (CCI) vs. Flipkart and Amazon[32]***. Bhargava found that the Commission did not actually make an independent assessment of the possible anti-competitive impact of the merger on the Indian aviation industry. The reality is that all Indian airlines are exposed to serious irreparable risks and harm if the competition is lost forever. The committee will typically consider potential transactions in two phases. In the first phase, the committee relies on information provided by the parties and has an initial idea of the possible anticompetitive impact of the proposed transaction. If the commission is satisfied with it the agreement would not cause a competitive impact on the market, he agrees business. Otherwise, it advises the Director General (Investigative Division of the Commission) to investigate the transaction in detail in Phase II

[31] The Competition Act, 2002, § 53, cl. B, No. 12, Act of Parliament, 2003 (India).
[32] Competition Commission of India (CCI) vs. Flipkart and Amazon (2020), MANU/KA/3124/2021.

of the merger assessment. COMPAT refused to delay the commission's approval but agreed to discuss the matter still the complainant. However, the Competition Appellate tribunal dismissed the appeal on the ground that the appellant had no 'locus Standi'.

4. CONCLUSION AND SUGGESTIONS

The researcher has undertaken extensive study on the topic chosen for research and has provided all the relevant information she thinks is important for the readers to understand the topic. With respect to mergers in general, the researcher is of the opinion that they are a form of restructuring and rebuilding an equipped and upgraded version of the existing business which has several benefits to the customers. The researcher is of the opinion that the Vodafone-Idea merger was merely a technique used to stand the competition in the market and overcome the debts. Not same with the case of Jet-Etihad where although international relations and world-class services were promised to the customers, the dominance the airways would create in the market would restrict the entry of another player into the routes covered by the merged airways. When one privileged entity with huge resources and capital is taking over the market share, the ones with minimal resources shall have the right to combine their resources and capital. To conclude, the researcher states that mergers help in increasing competition in the market and bring in innovation, unless they create a dominance in any form in the market.

The researcher wishes to suggest the following-

1. The dynamic nature of the market with respect to innovation, technological advancement, customer behaviour etc., should be incorporated into merger assessment.

2. The non-monetary aspects of a merger i.e., the product quality, variety etc., must be given greater importance.

3. The mergers among large-scale entities and small-scale entities respectively must be treated differently and the interests of the latter must be protected.

4. The pros and cons of each merger shall be identified with respect to each case keeping in mind the public interest.

5. The commission shall consider certain law reforms to fill the gaps related to shorter review periods, control procedures, notifications, thresholds etc.

REFERENCES

- T. RAMAPPA, COMPETITION LAW IN INDIA (Oxford 2006).
- Neeraj Tiwari, Merger under the Regime of Competition Law: Comparative Study of Indian Legal Framework with EC and UK, 23, BOND L. REV., 117 (2011).
- Sayed Qudrat Hashimy, The Anticompetitive Effect Of Mergers On Competition In Tanzania And India, 7, DRJ, 28(2022).
- Dhananjay Mani Tripathi, Merger Of Vodafone And Idea, 9, IJMR, 256 (2023).
- Nitesh Kumar, Merger And Acquisition Deal Between Vodafone And Idea, ALLIANCE UNIVERSITY (2021).
- Dr. Ashok Kumar Panigrahi, A Post-Merger Analysis of Vodafone-Idea Ltd., KALINGA UNIVERSITY (2019).
- Akansha Mehta, Jet-Etihad Deal and its Competitive Concerns, IPLEADERS (6th September, 2023, 14.00 pm), https://blog.ipleaders.in/jet-etihad-deal-and-its-competitive-concerns/
- Avirup Bose, Lessons to be learned from India's latest high profile merger review: the Jet-Etihad deal, SSRN (2014).
- Rahul Rai, Nikita Agarwal, Merger control in India: overview, AZB PARTNERS (Sep. 6, 2023, 19.51 PM) https://www.azbpartners.com/bank/merger-control-in-india-overview/
- Shruti Gupta, *Vodafone And Idea Merger*, LEGALSERVICEINDIA (Sep. 6, 2023, 20.06 PM) https://www.legalserviceindia.com/legal/article-12972-vodafone-and-idea-merger.html